Soonfroze Corp Sdn Bhd v Siti Salabiah bte Chek Hassan & Ors

HIGH COURT (TAIPING) — CIVIL APPEAL NO 16–2 OF 2002
VT SINGHAM J
5 JANUARY 2003

Civil Procedure *— Adjournment — Application for — Postponement of inquiry before assistant director of labor — Whether valid and reasonable ground for postponement — Whether assistant director of labor had erred when ignoring the ground advanced by employer for postponement*

Labor Law *— Employment — Termination benefits — Claim for termination benefits — Order by assistant director of labor for employer to pay termination benefits — Assistant director of labor did not give any decision or findings on material issues — Whether order for the employer to pay termination benefits can be enforced against employer without a decision by assistant director of labor as required under s 70(g) of Employment Act 1955 — Whether omission to comply with s 70(g) was curable*

This was an appeal by the employer against the decision of the Assistant Director of Labor, Taiping in respect of a claim for termination benefits payment by its employees. The employees' complaint was that they were not paid their salary for the month of August 2001 by the employer. The salary was due latest by the 7 September 2001. Therefore, the employees claimed that their contract of service was deemed to have been terminated as provided under s 15(1) of the Employment Act 1955 ('the Act') and that they were entitled to termination benefits under reg 4(1) of the Employment (Termination and Lay-Off Benefits) Regulations 1980. However, the employees continued to work until 8 October 2001 and had received their salary for the month of August 2001 on 4 October 2001 without protest. The inquiry before the assistant director of labor was adjourned to 9 January 2002 for hearing. When the case was called up for hearing on 9 January 2002, the employer's authorized representative was absent. In fact, the representative had applied for an adjournment on 8 January 2002 by a telephone call to the assistant director of labor on the ground that his wife had been admitted to a hospital in Penang and had delivered a baby on that day. The assistant director of labor refused the application for the postponement and proceeded with the hearing on 9 January 2002 in the representative's absence. On 9 January 2002, the representative also faxed a letter issued by a medical centre in Penang to the Labor Office, Taiping confirming the delivery of the baby by his wife. However, the hearing had ended by the time the letter was received and an order against the employer was made. The issues to be determined in this appeal were whether: (a) the assistant director of labor had correctly exercised his discretion when he refused to grant an adjournment to the employer and proceeded instead with the enquiry in the absence of the employer's representative; and (b) the assistant director of labor must

give a decision as envisaged by s 70(g) of the Act before an order pursuant to sub-s (i) was issued against an employer. A

Held, allowing the appeal, setting aside the order and remitting back the case for a re-trial:

(1) It was in the court's or tribunal's absolute discretion to decide whether to allow an application for the postponement of a case which had been set down for hearing. Hence, the granting of a postponement was an unfettered discretion. Nevertheless, the discretion which was exercised must be based on sound principles and be meaningful so as not to cause a miscarriage of justice. If there was an application for adjournment, the court must look at the material and the grounds for the adjournment in order to exercise its discretion correctly (see pp 370C, 374C, 380D). B C

(2) In the instant case, the assistant director of labor had erred when he ignored the ground advanced by the employer's representative as a right consideration and a reasonable ground for the postponement. Consequently, the assistant director of labor had not exercised his discretion correctly when he proceeded with the inquiry in the representative's absence although he was informed and given the reason as to why the latter was unable to attend the inquiry on 9 January 2002 (see p 380F–G). D

(3) In the circumstances, this court could not allow the inquiry which was heard and concluded ex parte to be sustained because justice in the Labor Court was not administered only for the employees but the employers as well. An employer was entitled to defend his employees' claim by oral or documentary evidence and every opportunity should be given for rebuttal evidence. Although the assistant director of labor was clothed with the discretion as to whether to grant the adjournment or not, that discretion must be exercised on a case to case basis and after giving due weight to the grounds advanced for the postponement and the material facts before the court (see p 381C–E). E F

(4) The record of proceedings which was included in the record of appeal showed that the assistant director of labor took only two and a half hours to record the evidence of the 19 employees as well as to question them. The manner in which the hearing was rushed coupled with the refusal to grant the postponement was very unsatisfactory. Justice should not be rushed in such a hurried manner and justice hurried in the manner as had been done in the instant appeal was tantamount to an abuse of discretionary justice and a defeat to justice (see pp 381H–382A). G H

(5) Accordingly, on the ground alone of the refusal to postpone the inquiry, the appeal should be allowed because the employer had been denied the opportunity of putting forward its case to rebut the employees' claim as well as to rebut the inference as provided in s 15(2) of the Act (see p 382F). I

(6) The document labelled as 'Grounds of Decision' of the assistant director of labor which was included in the record of appeal did not contain any decision as required under s 70(g) of the Act. The assistant director of labor must give his reasons for his decision and the decision must include his findings on material issues of fact and the evidence adduced at the inquiry together with his interpretation of the relevant statutory provision applicable to the case. In the instant appeal, none of these requirements had been complied except for the order which was issued. Without a decision by the assistant director of labor as required under s 70(g) of the Act, the order for the employer to pay the employees the sum of RM71,903.89 cannot be enforced against the employer because before an order was issued under s 70(i), there must be a decision by the assistant director of labor. The omission to comply with the mandatory provision of s 70(g) of the Act was not a mere irregularity which can be cured because it was a breach of an express statutory provision. Accordingly, the case had to be remitted back to the Labor Court, Taiping to be heard by another officer on its merit (see pp 382H–I, 383D–G, 384C).

[Bahasa Malaysia summary

Ini adalah satu rayuan oleh majikan terhadap keputusan Penolong Pengarah Buruh, Taiping berhubung dengan tuntutan untuk faedah-faedah pemberhentian kerja oleh pekerja-pekerjanya. Aduan pekerja-pekerja tersebut adalah bahawa mereka telah tidak dibayar gaji bagi bulan Ogos 2001 oleh majikan tersebut. Gaji tersebut kena dibayar selewat-lewatnya pada 7 September 2001. Oleh itu, pekerja-pekerja tersebut menuntut bahawa kontrak perkhidmatan mereka dianggap sebagai telah ditamatkan seperti mana yang diperuntukkan di bawah s 15(1) Akta Pekerjaan 1955 ('Akta tersebut') dan bahawa mereka adalah layak untuk mendapat faedah-faedah pemberhentian kerja di bawah peraturan 4(1) Peraturan-Peraturan Kerja (Faedah-Faedah Penamatan & Rentikerja Sentara) 1980. Walau bagaimanapun, pekerja-pekerja tersebut telah terus bekerja sehingga 8 Oktober 2001 dan telah menerima gaji mereka bagi bulan Ogos 2001 pada 4 Oktober 2001 tanpa bantahan. Siasatan di hadapan Penolong Pengarah Buruh telah ditangguhkan kepada 9 Januari 2002 untuk perbicaraan. Apabila kes tersebut dipanggil untuk perbicaraan pada 9 Januari 2002, wakil majikan tersebut telah tidak hadir. Wakil tersebut telah memohon, pada 8 Januari 2002, untuk mendapatkan suatu penangguhan melalui satu panggilan telefon kepada Penolong Pengarah Buruh atas alasan bahawa isteri beliau telah dimasukkan ke hospital di Pulau Pinang dan telah melahirkan anak pada hari itu. Penolong Pengarah Buruh telah menolak permohonan untuk penangguhan tersebut dan telah meneruskan perbicaraan pada 9 Januari 2002 tanpa kehadiran wakil majikan tersebut. Pada 9 Januari 2002, wakil tersebut juga telah mengirimkan melalui faks

sepucuk surat yang dikeluarkan oleh sebuah pusat perubatan di Pulau Pinang kepada Pejabat Buruh, Taiping yang mengesahkan kelahiran anak tersebut oleh isteri beliau. Walau bagaimanapun perbicaraan tersebut telahpun tamat ketika surat itu diterima dan satu perintah terhadap majikan telah dibuat. Isu-isu untuk ditentukan di dalam rayuan ini adalah sama ada: (a) Penolong Pengarah Buruh telah dengan betulnya melaksanakan budi bicara beliau bilamana beliau enggan untuk memberikan satu penangguhan kepada majikan tersebut dan sebaliknya telah meneruskan penyiasatan tersebut tanpa kehadiran wakil majikan tersebut; dan (b) Penolong Pengarah Buruh mestilah memberikan satu keputusan seperti mana yang ditunjukkan oleh s 70(g) Akta tersebut sebelum satu perintah selaras dengan sub-s (i) dikeluarkan terhadap seseorang majikan.

Diputuskan, membenarkan rayuan, mengenepikan perintah tersebut dan menghantar semula kes untuk perbicaraan semula:

(1) Ianya merupakan budi bicara mutlak mahkamah atau tribunal untuk memutuskan sama ada membenarkan sesuatu permohonan untuk penangguhan sesebuah kes yang mana telah ditetapkan untuk perbicaraan. Oleh itu, pemberian sesuatu penanguhan merupakan suatu keputusan yang tidak terbelenggu. Namun begitu, budi bicara yang dilaksanakan mestilah berasaskan prinsip-prinsip yang kukuh dan hendaklah bermakna supaya tidak menyebabkan salahlaksana keadilan. Jika terdapatnya satu permohonan untuk penangguhan, mahkamah mestilah melihat kepada material dan alasan untuk penangguhan tersebut demi melaksanakan budi bicaranya dengan betul (lihat ms 370C, 374C, 380D).

(2) Dalam kes semasa, Penolong Pengarah Buruh telah tersalah pertimbangan bilamana beliau tidak mempedulikan alasan yang telah dikemukakan oleh wakil majikan tersebut sebagai satu pertimbangan yang betul dan berpatutan untuk penangguhan tersebut. Akibatnya, Penolong Pengarah Buruh telah tidak melaksanakan budi bicaranya dengan betul bilamana beliau meneruskan siasatan tanpa kehadiran wakil tersebut meskipun beliau telah dimaklumkan dan diberikan alasan mengapa wakil tersebut tidak dapat menghadiri siasatan pada 9 Januari 2002 (lihat ms 380F–G).

(3) Dalam keadaan tersebut, mahkamah ini tidak boleh membenarkan siasatan tersebut yang mana telah didengar dan diputuskan ex parte supaya dibenarkan kerana keadilan di dalam Mahkamah Buruh tidak dikendalikan hanya untuk pekerja-pekerja sahaja tetapi majikan juga. Seseorang majikan berhak untuk membuat pembelaan terhadap tuntutan pekerja-pekerja melalui keterangan lisan atau dokumentari dan setiap peluang haruslah diberikan untuk mematahkan keterangan. Meskipun Penolong Pengarah Buruh mempunyai budi bicara sama ada

untuk memberikan penangguhan ataupun tidak, budi bicara itu mestilah dilaksanakan atas dasar kes demi kes dan selepas memberikan penekanan yang perlu ke atas alasan-alasan yang dikemukakan untuk penangguhan tersebut dan fakta-fakta material di hadapan mahkamah (lihat ms 381C–E).

(4) Rekod prosiding yang mana telah dimasukkan dalam rekod rayuan menunjukkan bahawa Penolong Pengarah Buruh hanya mengambil masa selama dua setengah jam untuk mencatatkan keterangan 19 orang pekerja-pekerja tersebut dan juga untuk menyoal mereka. Cara tergesa-gesa perbicaraan tersebut dijalankan beserta dengan keengganan untuk memberikan penangguhan tersebut adalah sungguh tidak memuaskan. Keadilan tidak seharusnya dilaksanakan secara tergesa-gesa dan keadilan yang dilaksanakan secara tergesa-gesa seperti mana yang dilaksanakan di dalam rayuan ini adalah sama seperti suatu penyalahgunaan keadilan mengikut budi bicara dan suatu kekecewaan kepada keadilan (lihat ms 381H–382A).

(5) Sehubungan itu, atas alasan enggan untuk menangguhkan siasatan sahaja, rayuan tersebut haruslah dibenarkan kerana majikan telah dinafikan peluang untuk mengemukakan kesnya bagi menyangkal tuntutan pekerja-pekerja tersebut dan juga untuk menyangkal inferens seperti mana yang diperuntukkan di dalam s 15(2) Akta tersebut (lihat ms 382F).

(6) Dokumen yang dilabelkan 'Grounds of Decision' Penolong Pengarah Buruh yang telah dimasukkan dalam rekod rayuan tidak mengandungi sebarang keputusan sepertimana yang dikehendaki di bawah s 70(g) Akta tersebut. Penolong Pengarah Buruh mestilah memberikan alasan beliau bagi keputusan dan keputusan tersebut mestilah termasuk pendapat-pendapat beliau mengenai isu-isu fakta material dan keterangan yang dikemukakan ketika siasatan bersama-sama dengan penafsiran peruntukan berkanun yang relevan yang boleh dipakai kepada kes tersebut. Dalam rayuan ini, tidak satu pun daripada syarat-syarat ini telah dipatuhi kecuali perintah yang telah dikeluarkan. Tanpa keputusan oleh Penolong Pengarah Buruh seperti mana yang diperlukan di bawah s 70(g) Akta tersebut, perintah terhadap majikan untuk membayar pekerja-pekerja tersebut jumlah sebanyak RM71,903.89 tidak boleh dikuatkuasakan terhadap majikan kerana sebelum sesuatu perintah dikeluarkan di bawah s 70(i), haruslah terdapat satu keputusan oleh Penolong Pengarah Buruh. Peninggalan untuk mematuhi peruntukan mandatori s 70(g) Akta tersebut bukan hanya suatu luar aturan biasa yang boleh dipulihkan kerana ianya merupakan suatu keingkaran peruntukan berkanun yang nyata. Sehubungan itu, kes tersebut haruslah dikembalikan kepada, Mahkamah Buruh, Taiping untuk didengar oleh seorang pegawai lain berdasarkan merit-meritnya (lihat ms 382H–I, 383D–G, 384C).]

Notes

For cases on application for adjournment, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 168–179.

For cases on termination benefits, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1003–1011.

Cases referred to

Bass, Re (1959) (19) DLR (2nd) 484 (refd)

Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1993] 3 MLJ 352 (refd)

Co-operative Retail Services Limited v Secretary State for the Environment & Ors [1980] 1 All ER 449 (refd)

Dick v Filler [1943] All ER 627 (refd)

Esso Production Malaysia Inc v Aladdin bin Mohd Hashim [2000] 3 MLJ 270 (refd)

Evans v Bartlam (1937) AC 473 (refd)

Foo Chiew Fong v Guriman [1957] MLJ 51 (refd)

Gardner v Jay 29 Ch D 50 (refd)

General Council of Medical Education & Registration of the United Kingdom v Spackman [1943] 2 All ER 387 (refd)

Go Pak Hoong Tractor and Building Construction v Syarikat Pasir Perdana [1982] 1 MLJ 77 (refd)

Goh Seng Thiam v Lee & The Ceylon Sports Club [1965] 1 MLJ 206 (refd)

Grimshaw v Dunbar [1953] 1 All ER 350 (refd)

Harbhajan Singh v Suruhanjaya Pasukan Polis, Malaysia & Anor [2002] 3 MLJ 714 (refd)

Hinckley and South Leicestershire Permanent Benefit Building Society v Freeman [1941] 1 Ch D 32 (refd)

Hong Siew Kai v Lim Tong Chan [2000] 4 CLJ 501 (refd)

Hup San Timber Trading Co Sdn Bhd v Tan Ah Lan [1979] 1 MLJ 238 (refd)

James v Minister of Pension [1947] 2 All ER 432 (refd)

Lee Ah Tee v Ong Tiow Pheng & Ors [1984] 1 MLJ 107 (refd)

Lee Kong Yin v PP [1970] 2 MLJ 205 (refd)

Lim Seng Gin & Anor v Reg [1956] MLJ 76 (refd)

Mat Yassin bin Dollah v Ibrahim bin Hussin & Anor [1997] 2 MLJ 681

Maxwell v Keun (1928) 1 KB 645 (refd)

Metrojaya Departmental Stores Sdn Bhd, Ipoh and Nancy Quah Kim Kee, Ipoh [1986] 1 ILR Sept 639 (refd)

Mohamed Ekram v PP [1962] MLJ 129 (refd)

Mogan a/l Maruthamuthu v PP [2002] 2 AMR 2495 (refd)

Mohanlal Gordhandas Sheth v Ban Guan & Co [1956] MLJ 13 (refd)

Nordin Hamid & Co v Pathmarajah & Anor [1990] 2 MLJ 308 (refd)

OCBC Bank (M) Bhd v Kredin Sdn Bhd [1997] 2 MLJ 544 (refd)

Ostreicher v Secretary of State for the Environment & Anor [1978] 1 All ER 591 (refd)

Packirisamy v Janagi [1970] 2 MLJ 202 (refd)

PP v H Chamras Tasaso [1975] 2 MLJ 44 (refd)
PP v Mah Chuen Lim & Ors [1975] 1 MLJ 95 (refd)
PP v Semban [1976] 1 MLJ 91 (refd)
PP v Tanggaah [1972] 1 MLJ 207 (refd)
Priddle v Fisher & Sons [1968] 1 WLR 1478 (refd)
R v Small Claims Tribunal and Homewood; ex parte Cameron [1976] VDR 427 (refd)
R v Thames Magistrates' Court ex parte Polemis [1972] 2 All ER 1219 (refd)
Ratnam v Cumabasamy & Anor [1965] 1 MLJ 228 (refd)
Rex v Sussex Justices, ex parte Mc Carthy [1924] 1 KB 256 (refd)
Ritter v Godfrey (1920) 2 KB 47 (refd)
Sullivan v Department of Transport [1978] 1 ALD 383 (refd)
Syarikat Pasir Perdana v Goh Pak Hoong Tractor and Building Construction [1981] 1 MLJ 314 (refd)
Tai Choi Yu v Government of Malaysia [1994] 1 MLJ 678 (refd)
Tan Foo Su v PP [1967] 2 MLJ 19 (refd)
Wan Hamzah bin Wan Muda & Anor v Marzuki bin Ibrahim & Anor [2002] 2 MLJ 152 (refd)

Legislation referred to

Employment Act 1955 ss 15(1), (2), 19, 69, 70(g), (i), 72
Employment (Termination and Lay-Off Benefits) Regulations 1980 reg 4(1)

Pravin Kaur Jessy (*Jessy & Assoc*) for the appellant.
T Selvadoray (*T Selva & Co*) for the respondents.

VT Singham J: This is an appeal against the decision of the Assistant Director of Labor, Taiping, which was given on 9 January 2002 in respect of a claim for termination benefits payment by 20 employees of a frozen food corporation. The appellant and the respondents will be referred to as the employer/corporation and employees respectively, wherever necessary for the purposes of this appeal.

In the instant appeal, there are basically two main legal issues:

(1) whether the assistant director of labor had correctly exercised his discretion when he refused to grant an adjournment to the corporation and proceeded with the inquiry in the absence of the corporation's representative.

(2) whether the assistant director of labor must give a decision as envisaged by s 70(g) of the Employment Act 1955 ('the Act') before an order pursuant to sub-s (i) is issued against an employer.

Facts

The complaint by 20 employees of the corporation to the Labor Office, Taiping on 2 November 2001 was that they were not paid their salary for the month of August, 2001 by their employer which was due latest by

7 September 2001. Therefore, they claimed that their contract of service is deemed to have been terminated as provided under s 15(1) of the Act. Accordingly, they have claimed termination benefits payments under reg 4(1) of the Employment (Termination and Lay-Off Benefits) Regulations 1980 ('the Regulations'). A

However, the employees continued to work with the corporation until 8 October 2001 and received their salary which was due for the month of August 2001, on 4 October 2001 without protest. Thereafter, Cik Siti Salabiah bte Chek Hassan filed the claim for herself and on behalf of the 19 other employees on 2 November 2001 for termination benefits payments amounting to RM71,903.87 (see s 72 of the Act). B

This inquiry pursuant to s 69 read with s 72 of the Act was fixed for hearing on 21 December 2001. The case was adjourned to 9 January 2002 for hearing. When the case was called up for hearing on 9 January 2002, the managing director of the corporation, Hj Ahmad Faize bin Ismail who had personal knowledge of the employees' claim was absent. In fact, he had applied for an adjournment one day earlier on 8 January 2002 by a telephone call to the assistant director of labor on the ground that his wife had been admitted to a hospital in Penang and had delivered a baby on 8 January 2002. The assistant director of labor refused the application for the postponement and proceeded with the hearing on 9 January 2002 in the absence of the corporation's authorized representative namely, Hj Ahmad Faize bin Ismail. C D

Hj Ahmad Faize bin Ismail had also faxed a letter dated 9 January 2002 from the Loh Gu Lye Specialists Center Penang to the Labor Office, Taiping on the afternoon of 9 January 2002 which was received at 2.36pm confirming his wife's delivery by which time the hearing was completed and an order against the corporation was made at 1.30pm to pay 19 of the employees the total sum of RM71,903.87 as termination benefits payments. One of the employees was absent and his claim was struck out. In fact, both the employees and the corporation were not represented by counsel at the inquiry in the Labor Court. The corporation was dissatisfied with the order of the Labor Court and filed an appeal on 22 January 2002 to the High Court, Taiping. E F

Before this court proceeds further, it is important to set out the relevant provisions of the Act which are applicable to this appeal. G

Effect of default payment of salary to employees on due date

Section 15(1) of the Act states:

> When contract is deemed to be broken by employer and employee H
>
> (1) An employer shall be deemed to have broken his contract of service with the employee if he fails to pay wages in accordance with Part III.

Section 19 of the Act states:

> Time of payment of wages
>
> 19 Every employer shall pay to each of his employees not later than the seventh day after the last day of any wage period the wages, less lawful deductions, earned by such employee during such wage period: I

A Provided that if the Director General is satisfied that payment within such time is not reasonably practicable, he may, on the application of the employer, extend the time of payment by such number of days as he thinks fit.

Section 72 of the Act states:

B Joinder of several complaints in one complaint

72 Where it appears to the Director General in any proceedings under this part that there are more employees than one having a common cause for complaint against the same employer or person liable, it shall not be necessary for each such employee to make a separate complaint under this part, but the Director General may, if he thinks fit, permit one or C more of them to make a complaint and to attend and act on behalf of and generally to represent the others, and the Director General may proceed to a decision on the joint complaint or complaints of each and all such employees:

Provided that, where the Director General is of opinion that the interests of the employer or person liable are likely to be prejudiced by the D non-attendance of any employee, he shall require the personal attendance of such employee.

Regulation 4(1) of the Regulations states as follows:

Termination

E 4(1) Subject to paras (2), (3) and (4), an employee shall be entitled to termination benefits payment where his contract of service is terminated for any reason whatsoever otherwise than —

(a) by the employer, upon the employee attaining the age of retirement if the contrat of service contains a stipulation in that behalf; or

(b) by the employer, on the grounds of misconduct inconsistent with the F fulfilment of the express or implied conditions of his service, after due inquiry; or

(c) voluntarily by the employee, other than under s 13(2) or for the reasons specified in s 14(3) of the Act.

(2) An employee shall not be entitled to any termination benefits payment if —

G (a) his contract of service is renewed, or he is re-engaged by the same employer under a new contract of service on terms and conditions which are not less favourable; and

(b) the renewal or re-engagement takes effect immediately on the ending of his employment under the previous contract:

Provided that the period of employment immediately prior to such renewal or H re-engagement shall be taken into account for the purpose of determining the amount of termination or lay-off benefits payment payable to an Employee.

(3) An employee shall not be entitled to any termination benefits payment if, not less than seven days before the date with effect from which his services are to be terminated, the employer has offered to renew his contract of service or to re-engage him under a new contract, so that —

I (a) the provisions of the contract as renewed, or of the new contract, as the case may be, as to the capacity and place in which he would be employed, and as to the other terms and conditions of his

employment, would not be less favourable than the corresponding provisions of the contract as in force immediately before the termination of his services; and

(b) the renewal or re-engagement would take effect on or before the date with effect from which his services are to be terminated, and the employee has unreasonably refused that offer.

(4) An employee shall not be entitled to any termination benefits payment where he leaves the service of his employer before the expiration of any notice given to him by his employer in accordance with s 12 of the act —

(a) without the prior consent of the employer, which consent shall not be unreasonably withheld; or

(b) without having made payment to the employer in accordance with s 13.

Postponement

It is settled law that it is 'in the absolute discretion' of the court or the tribunal to decide whether to allow or not an application for the postponement of a case which has been set down for hearing. In the instant appeal, the main complaint which was put forward by learned counsel for the corporation at the High Court is that the assistant director of labor had erred in law and in fact when he rejected the application for the postponement of the hearing which was scheduled on 9 January 2002 and proceeded with the hearing in the absence of the authorized representative of the corporation. In rejecting the application for the postponement, the assistant director of labor had relied solely on the observation of the president of the Industrial Court in *Metrojaya Departmental Stores Sdn Bhd, Ipoh and Nancy Quah Kim Kee, Ipoh* [1986] 1 ILR Sept 639, wherein it is stated:

> 4 There is no right of postponement. The company was served with a copy of the statement of case as far back as 28 June 1985, the date of mention for the case. It was the company's delay in engaging counsel on 2 December 1985, that caused counsel to request for a postponement. A party may be granted the right of representation by counsel. If he decides to be represented at the last moment, it is for counsel to accept the date of hearing and go on with the case, or decline to accept the brief. If a postponement is asked for by counsel, the discretion is with the court whether to allow a postponement.

It is important to distinguish the facts in *Metrojaya* with the facts in the instant appeal as to the ground for the postponement. In that case, the hearing was fixed on 11 December 1985. The company was served with a copy of the statement of case as early as 28 June 1985 being the date of mention but counsel was only engaged on 2 December 1985, about a week before the date of hearing, to represent the company. Counsel for the company applied for a postponement just before the hearing started on 11 December 1985 on the ground that she had just been retained on 2 December 1985. The application was not granted on the ground that it was the company which had delayed in engaging counsel until the last moment on 2 December 1985, even though they had been aware of the

A claim as early as 28 June 1985. Whereas in the instant appeal, the application for postponement was on an entirely different ground, where the wife of the corporation's authorized representative was admitted into the hospital and had given birth on 8 January 2002 and who required the presence of her husband. In any event, the observation by the president of the Industrial Court in *Metrojaya* on the discretionary power of the court on B whether to grant a postponement is not binding on this court although observations on employment and industrial disputes may be of assistance to this court when deciding cases on employment law.

However, before this court decides whether to deal with the merits of the claim in the instant appeal, it is useful to refer to some of the reported C cases on the issue of postponement. In *Hup San Timber Trading Co Sdn Bhd v Tan Ah Lan* [1979] 1 MLJ 238 when the case came up for hearing at the High Court, the appellant's counsel tendered a medical certificate issued by a Singaporean private medical practitioner on behalf of the appellant to confirm that the appellant was unfit to attend to duty for three days, which included the two days on which the case was fixed for hearing but did not D state what the patient's illness was. The respondent's counsel objected to the medical certificate on the ground that it was not in accordance with the prescribed statutory form which, inter alia, required the doctor to state what the patient was suffering from in addition to the fact that he was unfit to attend court. The learned judge however proceeded with the hearing in the absence of the appellant as his Lordship 'strongly suspected' that the E medical certificate and the absence of the appellant on the day of the trial was not just coincidence. Accordingly, the respondent was allowed to adduce evidence and judgment was entered against the appellant. The appellant appealed.

In allowing the appeal and setting aside the decision of the High Court, F his Lordship Wan Suleiman FJ said at p 238:

> No doubt failure by appellant to obtain a medical certificate containing the appropriate information in a form so prescribed as to remove suspicion that he was trying to delay proceedings has inclined the learned trial judge to allow this rather drastic measure. But it seems to us that in this instance the judge was in some doubt as to the real reason behind his inability to attend court. G *On occasions of doubt such as the present one the guiding principle should be that both parties should be given an opportunity to be heard. Any delay occasioned by what appears to be an inadequate reason for absence can be compensated by an award of appropriate costs.* (Emphasis added.)

In *Dick v Filler* [1943] All ER 627, by a majority decision Scott LJ said: H

> *The only question in the appeal is whether the judge erred or misdirected himself in law in refusing the particular adjournment.* Du Parcq LJ, thinks that, if the judge erred, his error was an error of fact. Croom-Johnson J, thinks there was an error of law. I have read both judgments with care and agree with the conclusion arrived at by the latter, although I agree with the former that, if the refusal of the adjournment had been an exercise of discretion on a pure I question of fact, no appeal would have lain under the County Courts Act, 1934, s 105. Upon the facts relating to the application for adjournment, I think that the judge caused a serious miscarriage of justice, and that, in doing

so, he neglected a first principle of law, for he deprived the defendant of his elementary right to *be heard before he was condemned.* A

The truly relevant facts can be very shortly stated. The opening and part of the evidence for the plaintiff having been heard some time previously, the plaintiff's evidence wasto be completed and the defendant's case heard on 9 December. *The defendant had been ill* with bronchitis in the latter part of November and was still, or had become again, ill early in December, and on 2 December the doctor who had been attending him gave him a certificate of his inability to follow his occupation. B

If justice required an adjournment on 9 December, what had happened before was irrelevant, except possibly as to costs, and the reference in the letter from the plaintiff's solicitors of 5 December to previous adjournments was beside the point, and also misleading, for it in fact misrepresented the past history of the case. which was this. The hearing of 16 September was adjourned to 28 October at the instance of the court, not of the parties. Before 28 October it was again adjourned, with the consent of the defendant's solicitors, to 25 November, in order to oblige the plaintiff's counsel, who had an important engagement in court elsewhere. Before 25 November arrived, *the defendant had fallen ill* with bronchitis: his solicitors obtained his doctor's certificate of his inability to attend and sent it to the plaintiff's solicitors, who agreed to an adjournment on 9 December, when the defendant's solicitors were expecting the defendant to be well enough to attend. C D

The case resolves itself into a short question of low. If an important witness — a fortiori if he is a party — is prevented by illness from attending the court for an adjourned hearing, at which his evidence is directly and seriously material, what is the legal duty of the judge when an adjournment is asked for? *In my view, if he is satisfied (i) of the medical fact and (ii) that the evidence is relevant and may be important, it is his duty to give an adjournment — it may be on terms — but ought to give it unless, on the other hand, he is satisfied that an injustice would thereby be done to the other side which cannot be reduced by costs.* These questions may depend on matters of degree, and matters of fact may be involved (as Du Parcq, LJ, truly says), but on the facts of the present case I think the judge went wrong in law, because (i) my two positive conditions were satisfied, and (ii) no suggestion was made that an injustice would result to the plaintiff. (Emphasis added.) E F

Groom Johnson LJ, another member of the panel of the majority decision said: G

On the question whether there has been a wrong exercise of discretion, a number of authorities were cited on us. In view of the passage from the judge's notes, to which I have already inferred, I feel sure that the judge must have taken into consideration statements which, on fuller examination, turn out to he inaccurate. He had apparently made up his mind on 16 September, long before any question of illness arose,to proceed with the trial in the absence of the defendant at the adjourned hearing, even if the defendant were absent. I cannot believe that the judge applied his mind to the possibility of an injustice resulting from the case being decided without the defendant's evidence. Had he done so he must, I think, have come to one conclusion only. He would then have had to consider whether a miscarriage of justice might arise to the plaintiff if an adjournment were granted. I can find no trace in the judge's notes of these points being considered or even being discussed, or whether an award of costs would not meet the case. H I

A For all these reasons I have come to the conclusion that this appeal is competent, *that the judge's discretion was wrongly exercised and his order wrong. It follows that I think this appeal should be allowed, the judgment appealed from be set aside and a new trial be ordered.* (Emphasis added.)

In *Mohanlal Gordhandas Sheth v Ban Guan & Co* [1956] MLJ 13, there was B an appeal against an interlocutory order of the High Court which had refused an adjournment as the appellant could not return from India in time for the hearing of the case owing to passport difficulties. In allowing the appeal, his Lordship Mathew CJ (with whom Whyatt CJ (S) and Buhagiar J agreed) said (at p 14):

C I think that an injustice may occur if the appellant is deprived of his right to defend the suit.

His Lordship had also referred to the observation of Atkin LJ in the case of *Maxwelll v Keun* [1928] 1 KB 645 which reads (at p 657):

D ... in the exercise of a proper judicial discretion no judge ought to make such an order as would defeat the rights of a party and destroy them altogether, unless he is satisfied that he has been guilty of such conduct that justice can only be properly done to the other party by corning to that conclusion.

In *Mohamed Ekram v Public Prosecutor* [1962] MLJ 129, the learned magistrate refused an application for an adjournment of the trial by counsel for the accused who had tendered a medical certificate that he was ill. In his E written application to the court which was sent two days before the trial, the learned counsel had sent along the medical certificate. The magistrate refused the application for the adjournment on the ground that there had been many postponements already. The accused appeal to the High Court. His Lordship Ismail Khan J (as he then was) in allowing the appeal observed that (at p 130):

F In this case, it is true there is nothing in the record to show at whose instance the several adjournments were made before counsel were retained. It may have been at the request of the respondent.

However, his Lordship observed that (at p 130):

G I do not however intend this to be regarded as a precedent or to give the impression that on application for an adjournment should automatically follow the production of a medical certificate from counsel. Each case should be considered on its merits.

In *Lee Ah Tee v Ong Tiow Pheng & Ors* [1984] 1 MLJ 107 at p 109, his H Lordship, Hashim Yeop A Sani FJ (as he then was) observed:

The discretion of the judge to allow or refuse an application for adjournment was a subject dealt with in depth by the Court of Appeal in *Dick v Piller* [1943] 1 All ER 627. We agree to and adopt the following principles as regards the discretion in allowing or refusing an adjournment:

I (1) Whether or not a party should be granted an adjournment is wholly at the discretion of the judge. He would exercise the discretion solely upon his view of the facts.

(2) Prima facie this discretion is unfettered.

(3) The question to ask in any particular case is whether on the facts there are adequate or sufficient reasons to refuse the adjournment.

(4) Although an appellate court has power to interfere with the judge's decision in regard to the granting of an adjournment, it would refrain from doing so unless it appears that such discretion has been exercised in a way which tended to show that all necessary matters were not taken into consideration or the decision was otherwise arbitrarily made.

(5) An appellate court ought to be very slow to interfere with the exercise of the discretion. But if it appears that the result of the order made below would be to defeat the rights of the parties altogether or that there would be an injustice to one or the other of the parties then the appellate court has power and indeed a duty to review the exercise of the discretion.

It cannot be denied that every case which is fixed for hearing should proceed with all convenient speed without having to adjourn the case on flimsy reasons. On the other hand, if there is an application for adjournment, the court must look at the material and the grounds for the adjournment in order to exercise its discretion correctly and should not deal with it as if it is a blanket refusal notwithstanding that cases fixed for hearing should proceed as scheduled. In *Public Prosecutor v Mah Chuen Lim & Ors* [1975] 1 MLJ 95, Syed Osman J (as he then was) said (at p 96):

> What is 'convenient speed' would depend on the circumstances of each particular case.

In *Tai Choi Yu v Government of Malaysia & Ors* [1994] 1 MLJ 677 at p 683, his Lordship Eusoff Chin SCJ (as he then was) observed that:

> What is 'convenient speed' has been held by the courts to mean reasonable time within which an act has to be done, but always having regard to the facts and peculiar circumstances of each case

(See *Harbhajan Singh v Suruhanjaya Pasukan Polis, Malaysia & Anor* [2002] 3 MLJ 714).

In *Re Bass* (1959) 19 DLR (2nd) 484, the only objection to the postponement to enable a witness for the appellant to be called was that it would not be convenient to members of the council who have come for the hearing in Vancouver from all over the Province. The appellant, a pharmaceutical chemist and a director and majority shareholder of London Drugs Limited, a pharmacy in the city of Vancouver appealed to the Supreme Court against the decision of the counsel. In allowing the appeal, Ruttan J said:

> ... if there was urgency, it could be met by granting a short adjournment of say two weeks, after which counsel could have proceeded peremptorily whether or not the witness was produced. The only objection to this later procedure would be the convenience of members of the Council. To this objection there is a very short answer aimed in the words of Lord Atkin in *General Council of Medical Education & Registration of the United Kingdom v Spackman* [1943] 2 All ER 387 at p 341 where Lord Atkin said:
>
> 'If this is inconvenient it cannot be helped ...*Convenience and justice are often not on speaking terms.* (Emphasis added.)'

In *R v Small Claims Tribunal and Homewood; ex parte Cameron* [1976] VDR 427 at p 432, his Lordship Deane J said:

> ... mere allocation of court time is of no value if the party in question is deprived of the opportunity of getting his tackle in order and being able to present his case in the fullest sense.

In *Tan Foo Su v Public Prosecutor* [1967] 2 MLJ 19, Raja Azlan Shah J (as His Highness then was) in a criminal matter observed (at p 19):

> Section 259(i) of the Criminal Procedure Code gives a magistrate an unfettered discretion to postpone or adjourn a criminal trial where a witness is absent or for any other reasonable cause. Reasonable cause is a term of art for lawyers and no definite ruling can be laid down; each case must be dealt with according to its own peculiar circumstances. It is no doubt an important adjunct to the administration of justice that there will be the least possible delay in trying a criminal case. *However, considerations may occur when a postponement or adjournment of a trial becomes desirable, namely, that a witness who has been named by an accused person is absent on the date of trial. It has been held in a similar case that the absence of a witness affords a reasonable cause for adjourning a criminal trial* (see *R v Virasami* (1896) ILR 19 Mad 375). Every latitude must be given to an accused person to defend his case and to call witnesses, more so when the accused person is not represented. In my view, the circumstances of this case warranted an adjournment so that the witness named by the appellant may be called. (Emphasis added.)

On the other hand, the court cannot arbitrarily postpone the hearing of a matter indefinitely because to do so might lead to defeating justice (see *Hinckley and South Leicestershire Permanent Benefit Building Society v Freeman* [1941] 1 Ch D 32 at pp 38–39. In *Go Pak Hoong Tractor and Building Construction v Syarikat Pasir Perdana* [1982] 1 MLJ 77, the facts of the case, inter alia, are as follows. At the date of the hearing, the defendants and their counsels were absent. The plaintiffs counsel mentioned the case and produced a telegram from the defendant's counsel which stated that the defendant fell sick and was unable to attend court the next day and that the defendant's counsel had applied for a postponement of the hearing. The defendant's solicitors had also informed the plaintiffs solicitors that the counsel in charge was unable to obtain a seat to fly to Kota Bahru. The learned trial judge, Mohd Zahir J (see *Syarikat Pasir Perdana v Goh Pak Hoong Tractor and Building Construction* [1981] 1 MLJ 314), disallowed the application for the postponement and entered judgment in default against the defendants. Hence, the appeal to the Supreme Court.

In refusing to interfere with the discretionary order made by Mohd Zahir J, his Lordship Hashim Yeop A Sani J (as he then was) said (at pp 77–78):

> *The granting of an adjournment is in the absolute discretion of the court depending on the facts of each case.* Unless it can be shown that the discretion was improperly exercised it should not be disturbed. The facts of the present case clearly show a lackadaisical attitude towards lawyers' duty to their clients and their duty to the courts. As stated in the grounds of judgment of the learned judge the case had been fixed for hearing about five months previously and suddenly on the date of hearing a telegram was received stating not only that

> counsel was unable to obtain a seat in the plane but also the defendant suddenly fell sick. One should also consider the difficult position of the courts in circumstances such as the present case. Here the learned judge has also stated that although he had entered judgment in default it would still be open for the appellant to apply to the court to set aside the order upon giving valid reasons. Unfortunately, no such application was ever made to the learned judge. (Emphasis added.)

(See *Ostreicher v Secretary of State for the Environment & Anor* [1978] 1 All ER 591 and *Co-operative Retail Services Limited v Secretary State for the Environment & Ors* [1980] 1 All ER 449).

In *Goh Seng Thiam v Lee & The Ceylon Sports Club* [1965] 1 MLJ 206 at p 207, the trial judge refused an application by the plaintiff for an adjournment to consider the amendment of the statement of defence which was allowed at the commencement of the trial and after a document which was not included in the affidavit of documents was produced by the defendant and admitted by the trial judge. On appeal by the plaintiff, the Federal Court declined to interfere with the exercise of the discretion by the trial judge.

The Honourable HT Ong CJ, in addressing the Bar Association Perak at its Annual Dinner on 10 October 1970, urged the legal profession to help speed up the administration of justice by refraining from seeking postponements on frivolous excuses. His Lordship observed:

> It is no secret that some lawyers are not above trotting out excuses to gain time. Often the real reason for seeking an adjournment is that counsel has not done his homework. Magistrate must insist on hearing cases on the days for which they are posted. Else, they will find themselves snowed under an impossible number of unfinished cases. The administration of justice is too serious a business to be left to the convenience of lawyers, however eminent. A rap or two on some distinguished knuckles could yield the desired results. (see [1970] 2 MLJ xxvi)

In *Nordin Hamid & Co v Pathmarajah & Anor* [1990] 2 MLJ 308, the counsel for the applicant was forced to discharge himself from representing his client because the Industrial Court had refused to grant an adjournment. In those circumstances, Eusoff Chin J (as he then was) said the Industrial Court would have failed to exercise its discretion judicially. His Lordship observed that (at p 309):

> ... by refusing to grant an adjournment, the Industrial Court had deprived the applicant of an opportunity to be heard and defend itself. The Industrial Court would then be acting in breach of the rule of natural justice when it proceeded to hear the reference and make the award.

However, on the particular facts and the background in *Nordin Hamid & Co*, the High Court did not interfere with the discretion exercised by the Industrial Court which had rejected the application by the applicant for an adjournment. His Lordship said (at p 311):

> Having regard to the background of the proceeding, the conduct of the applicant before the Industrial Court and the requirements of s 30(3) of the act, I find that the Industrial Court had acted reasonably, and had not acted

A in excess of its jurisdiction or in breach of the rules of natural justice when it decided to proceed to hear and dispose of the reference notwithstanding the last minute application for the adjournment and the subsequent act of the applicant's counsel discharging themselves from acting for the applicant.

On further appeal to the Supreme Court vide Civil Appeal No 02-122 of 1990, the appeal was dismissed on 24 September 1990.

B In *Public Prosecutor v Tanggaah* [1972] 1 MLJ 207, the learned magistrate refused to grant any further adjournment of the case which had been adjourned seven times previously. Learned counsel for the accused appealed to the judge of the High Court Ipoh when the learned magistrate refused his application for an adjournment. His Lordship Sharma J C observed (at p 208):

> The question of adjournment of a trial is a matter for the discretion of the court. That discretion, however is not an arbitrary one but has to be exercised Judicially and only in cases which come within the terms of this section (s 259(1) CPC). The discretion as to adjournment is entirely that of the trial magistrate and is unfettered by any outside authority however high such D authority be, irrespective of whether it is the Public Prosecutor or a distinguished counsel. The rank or status of the accused is an irrelevant consideration. Until the matter comes up in revision even the appellate court acts in excess of its jurisdiction if it tells the trial magistrate to postpone a particular case. The discretion is that of the magistrate and of the magistrate alone (inclusion of s 259(1) CPC if by this court).

E In another passage of the judgment at p 208 in *Public Prosecutor v Tanggaah*, His Lordship said:

> An adjournment, as already stated by me, can only be granted on the ground of the absence of a witness or for any other reasonable cause. *The general rule is that magistrates should refrain from granting adjournments except in those cases* F *where adjournments are clearly necessitated for the purpose of justice.* (Emphasis added.)

In *Public Prosecutor v Semban* [1976] 1 MLJ 91, His Lordship Harun J said (at p 92):

> G Before parting with the case, I would like to remind magistrates that if is in the public interest that cases which have been fixed for hearing should in fact be heard. *Postponements should be granted only on very exceptional grounds.* The convenience of counsel or the prosecuting officer is certainly not one of them. Of paramount importance is that members of the public who have come forward as witnesses should be given every consideration by the court so that the performance of their public duty is not only appreciated but subject to the H minimum of delay, inconvenience and expense. (Emphasis added.)

Nevertheless, it could be argued that a refusal to grant an adjournment may in some cases be tantamount to a denial of a reasonable opportunity being granted to the affected party to present his case. In *Sullivan v Department of Transport* [1978] 1 ALD 383, his Lordship Smithers J for the Federal Court I of Australia-General Division said:

> ... a refusal to grant an adjournment can constitute a failure to give a party to proceedings the opportunity of adequately presenting his case.

In *Priddle v Fisher & Sons* [1968] 1 WLR 1478, the appellant, an employee of the respondent, filed a claim for redundancy payment at the Industrial tribunal. The appellant was to be represented by a trade union representative and the tribunal knew of the representation. Unfortunately, on the day fixed for hearing, the union representative was too ill to attend the inquiry. In fact, the appellant had earlier made arrangement with the union representative to drive him to the hearing but when he went to fetch him, the union representative was too ill to travel. The appellant then wanted to proceed and conduct the case himself but on the way snow was falling and he concluded that he could not reach in time for the inquiry. The tribunal was informed of the predicament the appellant was faced and that he would not be able to attend the inquiry but by this time the case had already started about five minutes previously. However, the tribunal still proceeded. The union representative also telephoned the tribunal office and apologized for not being able to attend owing to his illness but the tribunal dismissed the application of the appellant for redundancy payment after hearing the employers. The appellant being dissatisfied with the decision appealed. In allowing the appeal, Lord Parker CJ said as summarized under the holdings:

(1) that, in the circumstances, the tribunal had exercised wrongfully the discretion to dispose of an application in the absence of a party knowing that the appellant was unable to attend, the tribunal should have adjourned unless satisfied that he was inviting them to continue the hearing in his absence.

(2) that the exercise of a judicial discretion on a wrong principle was a point of law within the jurisdiction of the court on appeal and that the matter would be remitted to the tribunal for rehearing. (see *R v Small Claims Tribunal and Homewood; ex-parte Cameron* [1976] V DR 427 at p 431; *Gioens v Department of Alcoholic Bewerage Control*, 176 Cal App 2d 529 at p 532 (1929).

In *Wan Hamzah bin Wan Muda & Anor v Marzuki bin Ibrahim & Anor* [2002] 2 MLJ 152 at p 156, his Lordship Nik Hashim J observed:

> ... but in the event of doubt as to the real reason behind the inability of the other party to attend court, the court should have allowed an adjournment to enable both parties to be heard (see *Abdul Mutalib bin Dato' Seri Razak v Malaysian Bar & Anor* [1997] MLJU 342).

Discretionary justice

In *Ritter v Godfrey* (1920) 2 KB 47, Lord Sterndale MR said:

> The discretion must be judicially exercised and therefore there must be some grounds for its exercise, for discretion exercised *on no grounds cannot be judicial.* (Emphasis added.)

Review by appellate court of the discretion exercised by lower court

In *Lim Seng Gin & Anor v Reg* [1956] MLJ 76, Spenser Wilkinson J observed:

A There are many decided cases regarding the exercise of judicial discretion and as to the powers of appellate courts to interfere with the exercise of such a discretion. Various kinds of discretion are dealt with by the authorities but the majority of these deal with costs. Even in those cases where costs are by statute left to the discretion off he Court an appellate Court will interfere if the discretion has been exercised on demonstrably wrong principles or if it has B been exercised without any grounds. (emphasis by this court)

Atkin LJ in *Maxwell v Keun* (1928) 1 KB 645 states:

> *... the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned Judge on such a question as an adjournment of a trial, and it very seldom does so; but, on the other hand, if it appears that the result of the order made below* C *is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or oilier of the parties, then the Court has power to review such an order, and it is, to my mind, its duty to do so.* (Emphasis added.)

In *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228 at p 229, Lord Guest D of Oak for the Privy Council observed:

> The principles upon which a court will act in reviewing the discretion exercised a lower court are well settled. There is a presumption that the judge has rightly exercised his discretion (*Charles Osenton & Co v Johnston* [1942] AC 130 per Lord Wright at p 148). The court will not interfere unless it is E clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice (*Evans v Bartlam* (1937) AC 473). Upon questions of procedure the Board is slow to interfere with the discretion exercised by a local court (*Mayor of Montreal v Brown & Anor* (1876) 2 App Cas 168).

F Gopal Sri Ram JCA in *Esso Production Malaysia Inc v Aladdin bin Mohd Hashim* [2000] 3 MLJ 270 at p 274 observed:

> ... Generally speaking, when a court exercises its discretion, and this includes the Industrial Court, a higher court, whether on appeal or on certiorari, should be slow to interfere with the exercise of discretion. As the Privy Council observed in *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228, there G is a presumption that a discretion has been properly exercised. The burden is on he who asserts that the discretion was wrongly exercised, in the exercise of such discretion by the Industrial Court, regard should be had to the factual matrix against which the discretion was exercised, including the reasons for the way in which it was exercised.
>
> H Thus, if the Industrial Court look into account irrelevant considerations or failed to take into account relevant considerations, the discretion will be described as having been unreasonably exercised. It will also be described as unreasonable if no reasonable tribunal similarly, circumstanced would have come to a similar decision: *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] I KB 223.

I In *Foo Chiew Fong v Guriman* [1957] MLJ 51, Mathew CJ (with Whyatt CJ(S) and Pretheroe J agreed) referred to the principle enunciated by Lord Wright in *Evans v Bartlam* (1937) AC 473 at p 486 which states (at p 51):

> It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the court is clearly satisfied that he was wrong. *But the court is not entitled simply to say that if the judge had jurisdiction and had all the facts before him, the Court of Appeal cannot review his order unless lie is shown to have applied a wrong principle. The court must if necessary examine anew tlie relevant facts and circumstances in order to exercise a discretion by way of review which may reverse or vary the order.* (Emphasis added.)

His Lordship Mathew CJ also referred to the observation of Bowen LJ in *Gardner v Jay* 29 Ch D 50 at p 58 where it is stated:

> 'That discretion' — (he was discussing the discretion of the judge as regards mode of trial) — like other judicial discretions must be exercised according to common sense and according to justice, *and if there is a miscarriage in the exercise of it, it will be reviewed.* (Emphasis added.)

On the facts and circumstances in that case, the Court of Appeal held that that was a case in which the appellate court should interfere with the exercise of a discretion and allowed the defendant's appeal against the refusal for adjournment by the lower court. Be that as it may, after having considered the long line of reported cases, it is clearly established that the granting of a postponement is entirely a matter of discretion which is unfettered. Nevertheless, the discretion which is exercised must be based on sound principles and be meaningful so as not to cause a miscarriage of justice although an application for a postponement cannot be claimed as of right as it is granted at the discretion of the court. This court has said in *Mogan a/l Maruthamuthu v Public Prosecutor* [2002] 2 AMR 2495 at p 2512, that the discretion given to a court or tribunal must be exercised according to the rules of reason and justice and not according to private opinion or judicial or individual whims (see also *Words and Phrases legally defined* Vol 2 (3rd Ed), *Black's Law Dictionary* (7th Ed) and *Supreme Court on Words and Phrases* by Surendra Malik) for definition of discretion.

In the instant appeal, the assistant director of labor had erred when he ignored the ground advanced by the corporation's authorized representative as a right consideration and a reasonable ground for the postponement. Consequently, the assistant director of labor had not exercised his discretion correctly when he proceeded with the inquiry in the absence of the corporation's representative although he was informed and given the reason as to why the authorized representative will not be able to attend the inquiry on 9 January 2002. In *Packirisamy v Janagi* [1970] 2 MLJ 202 at p 203, his Lordship Sharma J observed that:

> In exercising their discretion it is the duty of the courts to exercise that discretion judicially, that is in accordance with commonsense and in doing so should bear in mind all that may *promote justice and not defeat it.* If discretion is exercised otherwise, it may only tend to strike at the root of justice or result in injustice being done. I am furthermore of the view that every opportunity should be given to the litigants to put forward their cases and that they have a right to be heard within the limits prescribed by law if they do not violate any of the principles of procedure that the law has laid down. They have a right to be heard and it is the function of the courts to see that no unnecessary

A shackles are put on them by such rules of procedure which empower the courts to exercise the discretion one way or the other especially if one of the parties concerned can be adequately compensated by costs. (Emphasis added.)

In *Lee Kong Yin v Public Prosecutor* [1970] 2 MLJ 205 at p 206, his Lordship B Sharma J observed:

> It is a fundamental principle of law that no order should be passed to the prejudice of anyone without hearing him. A breach of this principle must necessarily result in injustice and would call for the setting aside of the proceedings. Where the law vouch-safes to a party the right of reply and the court refuses him such right the result must necessarily be unjust and it will C be unnecessary to consider whether actually any prejudice was caused.

In the circumstances, this court cannot allow the inquiry which was heard and concluded ex-parte to be sustained as justice in the Labor Court is not administered just for the employees but it should be equally and evenly applied to the employers as well where the parties in most number of cases D are not represented by counsel (see *James v Minister of Pension* [1947] 2 All ER 432 at p 435). An employer is entitled to defend his employees' claim by oral or documentary evidence and every opportunity should be given for rebuttal evidence. This court is mindful that it has been said time and time again by our superior courts that justice delayed is justice denied but it must also be reminded that justice hurried is also justice denied. Although the E assistant director of labor is clothed with the discretion which he may exercise as to whether to grant the adjournment or not but it is the respectful view of this court that that discretion must be exercised on a case to case basis and after giving due weight to the grounds advanced for the postponement and the material facts before the court. To use the words of Jankins LJ in *Grimshaw v Dunbar* [1953] 1 All ER 350 at p 353, the question F which has to be asked is did the judge here exercise his discretion on wrong considerations or wrong grounds or did he ignore some of the right considerations? It is the view of this court that where the consequences of refusing an adjournment on a valid, genuine and good ground may result in grave consequences to a party, it is better in the interests of justice to grant G the adjournment. Ultimately, the balance which had to be struck is to ensure fairness to both parties after weighing the need for expedition and the need to accord to a party a reasonable time to enable him to present his case. In *Hong Siew Kai v Lim Tong Chan* [2000] 4 CLJ 501 at p 504, his Lordship Abdull Hamid Embong J observed that:

H > ... in acting judicially in accord with the rules of natural justice, the court should also include the notion of acting fairly and the particular situation as found in this case demands that fairness be applied.

In the instant appeal, the record of proceedings which was included in the record of appeal shows that the assistant director of labor took only 21/2 hours to record the evidence of the 19 employees which included the time I taken for questioning them. The manner in which the hearing was rushed and continued to its conclusion during lunch break till 1.30 pm as recorded and coupled with the refusal to grant the postponement is glaringly so

unsatisfactory and no doubt leaves much to be desired that something is not right, and the proceedings were extraordinary. The order of the assistant director of labor cannot therefore be sustained and entitle the corporation to the intervention of this court. Justice should not be rushed in such hurried a fashion as justice hurried in that fashion as in the instant appeal tantamounts to abuse of discretionary justice and it would also defeat justice. Lord Hewart CJ in *Rex v Sussex Justices, ex parte Mc Carthy* [1924] 1 KB 256 observed:

> ... Nothing is to be done which creates even a suspicion that there has been an improper interference in the course of justice.

In *Public Prosecutor v H Chamras Tasaso* [1975] 2 MLJ 44, his Lordship Hashim Yeop A Sani J (as he then was) observed (at p 44):

> At the outset let me say this. I would rather live with arrears and backlog of cases, which is I think a lesser evil, than have cases disposed of with such a speed and in such hurried a fashion as would leave in the minds of the ordinary persons a lingering suspicion that something is not right. Justice must not only be done but must manifestly be seen to be done. This case which I have called for revision is a case in point.

His Lordship also referred to the observation of Lord Widgery CJ in *R v Thames Magistrates' Court ex parte Polemis* [1972] 2 All ER 1219 at p 1223 where he said:

> It is again absolutely basic to our system that justice must not only be done but must manifestly be seen to be done. If justice was so clearly not seen to be done, as on the afternoon in question here, it seems tome that it is no answer to the applicant to say, 'Well, even if the case had been properly conducted, the result would have been the same.' That is mixing up doing justice with seeing that justice is done, so I reject that argument.

Accordingly, on this ground alone where the postponement was refused by the assistant director of labor, the appeal should be allowed as the employer/corporation has been denied the opportunity of putting forward their case to rebut the employees claim as well as to rebut the inference as provided in s 15(2) of the Employment Act 1955. One thing must be made clear, this court will not abrogate its functions by refusing to review the exercise of the discretion of the lower court or tribunal even if the decision to refuse an adjournment was in the exercise of its discretion if the consequences of it has occasioned a miscarriage of justice. Judicial intervention in the view of this court becomes necessary when that discretionary justice is exercised with complete disregard to relevant consideration and which no doubt will result in unreasonable exercise of that discretion.

Decision of Labor Court to be embodied in the order

There is one other significant matter which this court had observed during the course of this appeal, namely, a document labelled as 'Grounds of Decision' of the assistant director of labor which was included in the record of appeal did not contain any decision as required under s 70(g) of the Employment Act 1955.

A Section 70(g) of the Employment Act 1955 states as follows:

> Procedure in Director General's inquiry
>
> The procedure for disposing of questions arising under s 69, 69(h) and 69(c) shall he as follows:
>
> (g) the director general shall, at the time and place appointed, examine on
B oath or affirmation those persons summoned or otherwise present whose evidence he deems material to the matters in issue and *shall then give his decision* on the matters in issue; ... (Emphasis added.)

It is only after the decision is given, it can then be embodied in a form as may be prescribed which then becomes an order for the purpose of
C enforcement. In fact the assistant director of labor did not even spell out his reason by express words in the document labeled as 'Grounds of Decision'. Subsection 70(i) of the Employment Act 1955 states:

> (i) *in order to enable a court to enforce the decision* of the director general, the director general shall embody his decision in an order in such form as may be prescribed. (Emphasis added.)

D

The assistant director of labor must also give his reasons for his decision and the decision shall include his findings on material issues of fact and the evidence adduced at the inquiry together with his interpretation of the relevant statutory provision applicable to the case. In the instant appeal, none of this requirements have been complied except for the order which
E was issued.

In the circumstances, this court is of the view that without a decision by the assistant director of labor as required under sub-s (g) of s 70, the order for the corporation to pay the employees the sum of RM71,903.89 cannot be enforced against the corporation as before an order is issued under sub-
F s (i) of s 70, there must be a decision by the assistant director of labor. In other words, it is a prerequisite that a decision must be made by the assistant director of labor before the order is issued. The word decision has been described as '... implies the exercise of a judicial determination as the final and definite result of examining a question (see *Words and Phrases legally defined* Vol 2. The omission in this case to comply with the mandatory
G provision of sub-s (g) of s 70 was not a mere irregularity which can be cured because it is a breach of an express statutory provision. Hence, the assistant director of labor had failed to comply with this pre-requisite by not giving a decision before the order was issued (see *Mat Yassin bin Dollah v Ibrahim bin Hussin & Anor* [1997] 2 MLJ 681), *OCBC Bank (M) Bhd v Kredin Sdn Bhd* [1997] 2 MLJ 544 and *Cheng Hang Guan & Ors v Perumahan Farlim*
H *(Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352.

Accordingly, the order which was issued under sub-s (i) of s 70 and does not embody the decision of the assistant director of labor as envisaged by sub-s (g) of s 70 cannot be enforced against the employers-corporation.)

As to the merits of the claim filed by the employees, learned counsel for
I the corporation contended that the employees having received the wages for August 2001 on 4 October 2001 and continue to work till 8 October 2001, the employees are deemed to have affirmed the contract and have

acquiesced. However, in view of the conclusion on the two legal issues aforesaid, it is undesirable for this court to go into the details on the merits of the case as the assistant director of labor has not heard the evidence on behalf of the corporation. Further, since the learned counsel for the corporation had strenuously argued that the employers have been denied the opportunity to present their case and that they have a good case to rebut the employees' claim, it is best that the rebuttal evidence be heard and decided by the Labor Court itself so that the corporation will have the opportunity to cross-examine the employees and put forward their case for the determination of the Labor Court. In the circumstances, the appeal of the employers-corporation is allowed and the order dated 9 January 2002 of the assistant director of labor against the corporation to pay the sum of RM71,903.89 to the 19 employees is set aside and a retrial is ordered.

Accordingly, the case is remitted back to the Labor Court, Taiping to be heard by another officer on its merit. Each party is ordered to bear their own costs. The case is fixed for mention on 14 November 2002 at the Labor Court, Taiping. Deposit of the appeal is returned to the employers-corporation solicitors.

Appeal allowed.

Reported by Lim Lee Na